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Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

LILLIAN BOEHM,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME AND PETITION FOR REHEARING.

LOUIS BOEHM,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

LILLIAN BOEHM,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, on behalf of the above named petitioner prays that the within motion for leave to file a petition for a rehearing out of time be granted in furtherance of the interests of substantial justice.

The within case was decided by this Court on November 13, 1945.

Pursuant to Rule 33 of the Rules of this Court petitioner's time within which to file a petition for rehearing expired on December 7, 1945. Neither petitioner nor the undersigned were aware of the provisions of Rule 33 and mistakenly believed that the time for filing a petition for rehearing was three months from the date of the decision.

It was not until December 13, 1945 that the undersigned learned for the first time of the provisions of Rule 33, and gave careful consideration to the opinion of this Court and concluded that the within petition for a rehearing should be submitted.

WHEREFORE, it is respectfully requested that the within motion for leave to file the annexed petition for re-hearing out of time should be granted.

Dated, New York, December 28, 1945.

LOUIS BOEHM,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

LILLIAN BOEHM,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

Statement

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, on behalf of the above named petitioner prays that a rehearing be granted of the above entitled case and that the decision of this Court be modified and the case remanded for further proceedings to the Tax Court of the United States in accordance with the opinion of this Court.

Facts

Petitioner was a stockholder of the Hartman Corporation. In December, 1932, together with other stockholders, she commenced a derivative stockholders' action against the

directors of the corporation for mismanagement and waste. In February, 1937, the action was compromised and settled. Petitioner received $12,500.00 pursuant to settlement. In her 1937 income tax return, petitioner claimed a deduction from gross income in the amount of $19,940.00, being the difference between the purchase price of the stock and the amount received under the settlement. The Commissioner denied the deduction. The Tax Court sustained his action and the Court below affirmed.

Decision of this Court

The decision of this Court (66 S. Ct. 125) was not based on the merits. It was predicated on the omission of certain evidence in the record which this Court deemed essential to establish the value of the suit which petitioner and others had brought against the Hartman directors. This Court stated in its opinion at 66 S. Ct., page 124:

> "While the stockholders' suit was prosecuted against defendants of admitted 'financial responsibility' and constituted an asset of the corporation until settled in 1937, the Tax Court felt that no substantial value to the suit had been shown. There was no evidence in the stipulation of the merits of the suit, the probability of recovery or any assurance of collection of an amount sufficient to pay the creditors' claim of more than $630,000 and to provide a sufficient surplus for stockholders so as to give any real value to their stock."

It is respectfully submitted that the Court should grant the within petition for a rehearing and remand the case to the Tax Court of the United States in order to enable petitioner to offer the evidence which this Court found to be lacking.

This case was submitted to the Tax Court upon a stipulation of facts. The stipulation provided "this stipulation shall be without prejudice to the right of either

party to introduce other and further evidence not inconsistent with the facts herein stipulated" (R., p. 20). No further evidence was offered by either party because counsel for both parties believed that the stipulation included all the facts necessary for a determination of the issues of this case on the merits (R., p. 17).

On October 23, 1943, the Tax Court decided this case against petitioner and in its opinion stated (R., p. 67):

> "We have no evidence on which to base a conclusion that the Graham suit was an asset of any substantial value. We know nothing of the merits of the suit, the probability of recovery, the assurance of the collection of a judgment, or other essential factors. The stipulated fact that the defendants were men of financial responsibility is not sufficient to establish the collectibility of a recovery equal to the outstanding claims."

On November 5, 1943, in compliance with the decision of the Tax Court that the stipulation was incomplete, petitioner filed a motion for a rehearing in the Tax Court to open the record for the presentation and submission of further evidence concerning the merits of the suit, the probability of recovery and the collectibility of a judgment (R., pp. 17-19). In support of said motion petitioner alleged as follows (R., p. 18):

> "Evidence will be offered on the rehearing to show that the recovery on the causes of action set forth in the complaint would far exceed the amount of outstanding claims of creditors, and would leave a substantial amount for the stockholders. Evidence will also be offered that the defendant directors in the Graham suit were able to respond to any judgment that might be rendered against them and that their net worth was many millions of dollars" (R. p. 18).

This motion was denied on November 8, 1943 (R. p. 2).

At the time that the stipulation of facts was prepared counsel for both parties were of the opinion that it set

forth all the essential facts to enable the Tax Court to decide this controversy *upon the merits.* Had they thought otherwise, they would have amplified the stipulation, or brought oral proof as to the matters the Tax Court deemed essential pursuant to the provisions of the stipulation quoted *supra.* This Court, the Circuit Court of Appeals and the Tax Court all based their decisions on the ground that the stipulation did not contain all the essential facts, and that, as the burden of proof was on the taxpayer, she had not sustained her burden. In other words, the decision of every court that has passed on this case was based not on the merits of the controversy, but upon the insufficiency of the stipulation to set forth all of the essential facts to enable a decision on the merits to be made.

This case was submitted to the Tax Court without oral argument. The first notice petitioner had that the Tax Court deemed the stipulation insufficient was after its decision had been rendered. There was no opportunity for discussion between Court and counsel such as ordinarily takes place on the trial of an action, and which would have enabled petitioner to supply the evidence which the trial judge deemed necessary to enable him to decide the case on the merits. Petitioner, therefore, had no opportunity to supply proof which the Court deemed essential on the trial of an issue of fact. Under such circumstances, we respectfully submit that the Tax Court should not only have granted, but should have welcomed, the motion to reopen the case so that it could have decided it upon the merits instead of on the alleged insufficiency of the stipulation.

In the application to the Tax Court to reopen this case, petitioner stated (R. p. 19):

> "Unless this further evidence is supplied on a rehearing, the decision in this case will not be upon the merits. The stipulation of facts was prepared for the convenience of the Court, and to eliminate the necessity of deciding factual issues concerning which there was no dispute. In endeavoring to expedite the admin-

istration of justice in this controversy, the parties inadvertently failed to supply evidence which this Court upon a careful study of the case deemed to be necessary to a proper determination of the issues on the merits. Petitioner should not be prejudiced by this inadvertent omission. Petitioner and her counsel believe that the further evidence will result in a decision of both issues on the merits, instead of a decision based upon the inadvertent omission of necessary facts in the stipulation. For that reason, the granting of the within motion will be in the interest of substantial justice."

We respectfully submit that the administration of justice is not advanced by having decisions based upon technicalities or inadvertent omissions or because the parties have inadvertently failed to include facts thought to be essential in a stipulation which both parties believed gave to the Court the essential facts for a decision on the merits. We respectfully submit that the Tax Court erred in refusing to reopen the case and that this honorable Court should exercise its supervisory power over the administration of the Federal Courts to rectify that error.

Petitioner argued before the Circuit Court of Appeals that the case should be remanded to the Tax Court for reopening and further proceedings. That Court, however, did not pass upon this request.

Petitioner respectfully submits that this Court should grant the within motion for a rehearing and remand the case to the Tax Court to enable petitioner to submit proof concerning these issues. Only by the presentation of this further evidence can an obvious injustice be avoided.

This Court itself recognized the injustice and hardship to petitioner saying at page 125, *supra:*

"The taxpayer points to the consequences of error and other difficulties confronting one who in good faith tries to choose the proper year in which to claim a deduction. But these difficulties are inherent under

the statute as now framed. Any desired remedy for such a situation, of course, lies with Congress rather than with the courts. It is beyond the judicial power to distort facts or to disregard legislative intent in order to provide equitable relief in a particular situation."

Congressional action may relieve future injustices but obviously cannot remedy the injustice to petitioner.

The injustice in the instant case has been the subject of considerable comment. (See article by Godfrey N. Nelson, in New York Times Financial Section, December 2, 1945, page 1, discussing the opinion of this Court in the instant case.)

We respectfully submit that the injustice resulting in the instant case can and should be remedied by remanding the case to the Tax Court and affording petitioner an opportunity of submitting the evidence which has been held to be lacking in the instant case in order to secure a determination on the merits.

Respectfully submitted,

LOUIS BOEHM,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1945.

Lillian Boehm, Petitioner, *vs.* Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 13, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

We are met here with the problem of whether the Tax Court properly found that certain corporate stock did not become worthless in 1937, thereby precluding the petitioning taxpayer from claiming a deductible loss in that year under § 23(e) of the Revenue Act of 1936.[1]

The facts, which are stipulated, show that the taxpayer in 1929 bought 1,100 shares of Class A stock of the Hartman Corporation for $32,440. This corporation had been formed to acquire the capital stock of an Illinois corporation, and its affiliates, engaged in the business of selling furniture, carpets and household goods.

In April, 1932, the Hartman Corporation sent its stockholders a letter reporting that the current business depression had caused shrinkage of sales, decline in worth of assets[2] and unprecedented credit and corporate losses. Another letter sent the following month informed them that business had not shown any improvement although counteracting measures were being taken. Then on June 16, 1932, a federal court in Illinois appointed equity receivers upon the allegations of a creditor, which were admitted to be true by the Hartman Corporation, that the company had sustained large liquidating and operating losses from 1930 to 1932.[3]

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[1] 49 Stat. 1648, 1659; 26 U. S. C. § 23(e).

[2] The balance sheet as of December 31, 1931, which accompanied this letter, showed assets and liabilities of $15,401,097.97 and a total net worth of $9,410,659.50.

[3] The creditor's bill of complaint stated that Hartman Corporation and its subsidiaries in 1931 sustained losses of $701,648 from closing stores and losses of $1,150,000 from necessary liquidation. It was further alleged that

Subsequently, on December 16, 1932, a stockholders' derivative action, the so-called Graham suit, was instituted in a New York court against the Hartman Corporation and nine members of its board of directors, some of whom were also officers. This suit was brought by the taxpayer and eight others on behalf of themselves as stockholders[4] and on behalf of the corporation and all other stockholders who might join with them in the suit. The defendants were charged with waste, extravagance, mismanagement, neglect and fraudulent violation of their duties as officers and directors, "to the great damage, loss and prejudice of the Corporation and its stockholders." The plaintiffs sought (1) to compel the defendants to account to the corporation for their official conduct, (2) to compel the defendants to pay to the corporation's treasury the amount of loss resulting from their alleged wrongful acts, (3) to secure from the corporation suitable allowance for counsel fees and other costs incurred in the suit and (4) to secure such other relief as might be just, equitable and proper.

The Hartman Corporation ceased operations under the receivers on May 26, 1933, when a new company, Hartman's Inc., bought at a bankruptcy sale all of the assets of Hartman Corporation's subsidiary company for $501,000. The stock of the new company was issued to the subsidiary's creditors. Stockholders of Hartman Corporation were also given the right to subscribe to the stock and debentures of the new company, but the taxpayer did not exercise that right.

The receivers filed their first report in the federal court on August 10, 1934, in which it appeared that Hartman Corporation had outstanding claims of $707,430.67 and assets of only $39,593.13 in cash and the pending Graham suit. It does not appear whether the suit was listed as having any value. The identical situation was apparent in the second report, filed on July 11, 1935, except that the cash assets had fallen to $27,192.51. A 4% divi-

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the corporation sustained operating losses in 1930 in the amount of $1,830,000; in 1931, $2,076,266; from January, 1932, to June 16, 1932, $400,000. After stating that the company was being operated at a great financial loss and that it was unable to meet and pay its obligations, the bill concluded by alleging that the assets and properties were of great value and that if they were administered through a receivership they would be sufficient to pay all of the corporation's liabilities, leaving a surplus for the stockholders.

[4] These nine plaintiffs represented 4,407 of the approximately 60,000 Class A shares outstanding and 1/3 of the more than 335,000 Class B shares outstanding.

dend to creditors was also approved at that time. On September 30, 1937, the final report was made. Outstanding claims of $630,574.57 were then reported; the sole asset was cash in the amount of $1,909.94, which was then distributed to creditors after deduction of receivership costs.

In the meantime the Graham suit was slowly progressing. From 1933 to 1936, inclusive, extensive examinations were made of certain defendants, the plaintiffs expending some $2,800 in connection therewith exclusive of counsel fees. But the case never reached trial. On February 27, 1937, a settlement was consummated whereby the defendants paid the taxpayer and her eight co-plaintiffs the sum of $50,000 in full settlement and discharge of their claims and the cause of action. The taxpayer's share of the settlement, after payment of expenses, amounted to $12,500.

The taxpayer had tried unsuccessfully in her 1934 income tax return to claim a deduction from gross income in the amount of $32,302 as a loss due to the worthlessness of her 1,100 shares of stock. The Commissioner denied the deduction on the ground that the stock had not become worthless during 1934; apparently no appeal was taken from this determination. Then in 1937 the taxpayer claimed a deduction from gross income in the amount of $19,940, being the difference between the $32,440 purchase price of the stock and the $12,500 received pursuant to the settlement. The Commissioner again denied the deduction, this time on the ground that the stock had not become worthless during 1937. The Tax Court sustained his action and the court below affirmed as to this point.[5] 146 F. 2d 553. We granted certiorari because of an alleged inconsistency with *Smith* v. *Helvering*, 141 F. 2d 529 (App. D. C.), as to the proper test to be used in determining the year in which a deductible loss is sustained.

Section 23(e) of the Revenue Act of 1936, like its identical counterparts in many preceding Revenue Acts, provides that in computing net income for income tax purposes there shall be allowed as deductions "losses sustained during the taxable year and not compensated for by insurance or otherwise." Treasury regulations, in effect prior to and at the time of the adoption of the 1936

[5] The Commissioner also included in the taxpayer's 1937 gross income the $12,500 received in the settlement and the Tax Court sustained his action. But the court below reversed, holding that the $12,500 must be regarded as a capital item in reduction of loss rather than as income. This point is not now before us.

Act and repeated thereafter, have consistently interpreted § 23(e) to mean that deductible losses "must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed."[6] Such regulations, being "long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill,* 305 U. S. 79, 83.

First. The taxpayer claims that a subjective rather than an objective test is to be employed in determining whether corporate stock became worthless during a particular year within the meaning of § 23(e). This subjective test is said to depend upon the taxpayer's reasonable and honest belief as to worthlessness, supported by the taxpayer's overt acts and conduct in connection therewith.

But the plain language of the statute and of the Treasury interpretations having the force of law repels the use of such a subjective factor as the controlling or sole criterion. Section 23(e) itself speaks of losses "sustained during the taxable year." The regulations in turn refer to losses "actually sustained during the taxable period," as fixed by "identifiable events."[7] Such unmistakable phraseology compels the conclusion that a loss, to be deductible under § 23(e), must have been sustained *in fact* during the taxable year. And a determination of whether a loss was in fact sustained in a particular year cannot fairly be made by confining the trier of facts to an examination of the taxpayer's beliefs and actions. Such an issue of necessity requires a practical approach, all pertinent facts and circumstances being open to inspection and consideration regardless of their objective or subjective nature. As this Court said in *Lucas* v. *American Code Co.*, 280 U. S. 445, 449, "no definite legal test is provided by the statute for the determination

[6] Treasury Regulations 94, Art. 23(e)-1, under the Revenue Act of 1936. Identical language is contained in Regulations 86, Art. 23(e)-1, under the Revenue Act of 1934; Regulations 101, Art. 23(e)-1, under the Revenue Act of 1938; Regulations 103, Sec. 19.23(e)-1, under the Internal Revenue Code; and Regulations 111, Sec. 29.23(e)-1, under the Internal Revenue Code.

[7] Treasury Regulations 94, Art. 23(e)-4, further makes clear that only losses in fact are deductible. Losses on stock due to shrinkage of value are allowable only to the extent "actually suffered when the stock is disposed of." And if, before being disposed of, the stock becomes worthless, its cost or other basis "is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness."

of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal, test."

The standard for determining the year for deduction of a loss is thus a flexible, practical one, varying according to the circumstances of each case. The taxpayer's attitude and conduct are not to be ignored, but to codify them as the decisive factor in every case is to surround the clear language of § 23(e) and the Treasury interpretations with an atmosphere of unreality and to impose grave obstacles to efficient tax administration.

Second. The taxpayer contends that even under the practical, realistic test the stipulated facts demonstrate as a matter of law that the stock of the Hartman Corporation did not become worthless until 1937, when the stockholders' suit was settled. Hence it is claimed that the Tax Court erred in concluding that there was not a deductible loss in 1937 within the meaning of § 23(e).

But the question of whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be determined in the first instance by the Tax Court, the basic fact-finding and inference-making body. The circumstance that the facts in a particular case may be stipulated or undisputed does not make this issue any less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts. And an appellate court is limited, under familiar doctrines, to a consideration of whether the decision of the Tax Court is "in accordance with law." 26 U. S. C. § 1141(c)(1). If it is in accordance, it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts. *Commiss[illegible] v. Scottish American Co.*, 323 U. S. 119.

Here it was the burden of the taxpayer to establish the fact that there was a deductible loss in 1937. *Burnet* v. *Houston*, 283 U. S. 223, 227. This burden was sought to be carried by means of the stipulation of facts. But the Tax Court, using the practical test previously discussed, found the stipulated facts "insufficient to establish that the stock had any value at the beginning of 1937 and became worthless during that year." It felt that such evidence "clearly shows that the stock was worthless prior to that year."

We are unable to say that the Tax Court's inferences and conclusions on this factual matter are so unreasonable from an evidentiary standpoint as to require a reversal of its judgment. The stipulation shows a succession of "identifiable events," occurring long before 1937, to justify the conclusion that the stock was worthless prior to the taxable year. The serious losses over a period of years, the receivership, the receivers' reports, the excess of liabilities over assets, the termination of operations and the bankruptcy sale of the assets of the principal subsidiary all lend credence to the Tax Court's judgment.[8] While the stockholders' suit was prosecuted against defendants of admitted "financial responsibility" and constituted an asset of the corporation until settled in 1937, the Tax Court felt that no substantial value to the suit had been shown. There was no evidence in the stipulation of the merits of the suit, the probability of recovery or any assurance of collection of an amount sufficient to pay the creditors' claims of more than $630,000 and to provide a sufficient surplus for stockholders so as to give any real value to their stock. The mere fact that the defendants were financially responsible does not necessarily inject any recognizable value into the suit from the stockholders' viewpoint. Hence it was reasonable to conclude that all value had departed from the stock prior to 1937 and that there was nothing left except a claim for damages against third parties for destruction of that value.

The taxpayer points to the consequences of error and other difficulties confronting one who in good faith tries to choose the proper year in which to claim a deduction. But these difficulties are inherent under the statute as now framed. Any desired remedy for such a situation, of course, lies with Congress rather than with the courts. It is beyond the judicial power to distort facts or to disregard legislative intent in order to provide equitable relief in a particular situation.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[8] See, in general, 5 Mertens, Law of Federal Income Taxation §§ 28.65 to 28.69; Lynch, "Losses Resulting From Stock Becoming Worthless—Deductibility Under Federal Income Tax Laws," 8 Fordham L. Rev. 199.